Ooi Boon Teong (Trading as Mitsu-Da Construction) v MBf Construction Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22-8-94
RANITA HUSSEIN JC
5 AUGUST 1994

Contract *— Building contract — Work done — Claim by sub-contractor under certificates of payment issued by contractor — Sub-contract not in RIBA form — Whether contractor could raise set-off and cross-claim — Whether rule that there cannot be any set-off or cross-claim when an amount is due under a certificate of payment applies to contractor and sub-contractor*

Civil Procedure *— Summary judgment — Leave to defend — Conditional leave — Defence was shadowy — Cross-claim and set-off raised only after plaintiff's suit filed and third parties had entered site*

Civil Procedure *— Summary judgment — Sub-contractor's claim for work done — Whether main contractor had raised triable issues as to costs of rectifying sub-contractor's defective work — Rules of the High Court 1980 O 14*

The plaintiff had undertaken sub-contract works for the defendant and claimed a sum of RM952,972.43 for work done. The plaintiff applied for judgment under O 14 of the Rules of the High Court 1980 and based his claim on various certificates of payment issued by the defendant, contending that according to their agreement, the certificates were to be honoured within 30 days of their issue by the defendant. The defendant, while admitting that the sum of RM952,972.43 was unpaid under the certificates, disputed its liability to pay on the basis that they were only interim certificates and payment was subject to final measurements and valuation. In its defence, the defendant claimed a set-off of RM4,158.89 for plant and machinery hired by the plaintiff and RM615,000 as the estimated cost of rectifying defects discovered after the certificates of payment were issued. The plaintiff argued that there could not be any set-off or cross-claim when an amount was due under an interim certificate of payment.

Held, dismissing the plaintiff's application for summary judgment and granting the defendant conditional leave to defend:

(1) The general rule that there cannot be any set-off or cross-claim when an amount is due under an interim certificate of payment does not apply between contractor and sub-contractor but only applies to employer and contractor where the RIBA form of contract is used.

(2) In the present case, there were no formal sub-contracts but only letters of award. The RIBA form of contract was not used and the certificates were not certificates under RIBA. As the defendant's

claims related directly to the sub-contract works, it could dispute the amount in the certificates of payment and put up a defence of set-off. Furthermore, the claim for rectification works was a triable issue which should be argued at a full trial.

(3) However, the court had some reservations about the veracity of the defendant's cross-claim pertaining to remedial works because the claim was raised only after the suit was filed and after third parties had gone into the site. Accordingly, the defendant was given leave to defend on condition that it paid the sum of RM465,034.12 (RM952,972.43 minus RM487,938.31 (the minimum sum that the defendant was prepared to dispute)) into court within 14 days, in default of which the plaintiff would be entitled to judgment for that sum.

[Bahasa Malaysia summary

Plaintif telah menjalankan kerja-kerja sub-kontrak untuk defendan dan menuntut jumlah RM952,972.43 sebagai bayaran untuk kerja itu. Plaintif telah memohon untuk mendapatkan penghakiman di bawah A 14 Kedah-Kaedah Mahkamah Tinggi 1980 dan berdasarkan tuntutannya pada beberapa perakuan bayaran yang telah dikeluarkan oleh defendan dan menegaskan bahawa di bawah perjanjian mereka, perakuan itu sepatutnya dijelaskan dalam masa 30 hari dari tarikh mereka dikeluarkan oleh defendan. Defendan, walaupun mengakui bahawa jumlah RM952,972.43 tidak dibayar di bawah perakuan itu, mempertikaikan liabilitinya untuk membayar atas dasar bahawa perakuan tersebut hanya merupakan perakuan interim dan bayaran mereka tertakluk kepada ukuran dan penilaian muktamad. Di dalam pembelaannya, defendan menuntut suatu tolakan sebanyak RM4,158.89 untuk loji dan mesin yang disewa oleh plaintif dan RM615,000 sebagai kos yang dianggarkan untuk membaiki kecacatan yang dijumpai selepas perakuan bayaran itu telah dikeluarkan. Plaintif berhujah bahawa sebarang tolakan atau tuntutan balas tidak boleh dibenarkan di mana suatu jumlah kena dibayar di bawah suatu perakuan bayaran interim.

Diputuskan, menolak permohonan plaintif untuk penghakiman terus dan memberikan defendan kebenaran membela bersyarat:

(1) Rukun am bahawa sebarang tolakan atau tuntutan balas tidak boleh dibenarkan di mana suatu jumlah kena dibayar di bawah suatu perakuan bayaran interim tidak terpakai di antara seorang kontraktor dan sub-kontraktor tetapi hanya terpakai kepada seorang majikan dan kontraktor di mana kontrak yang digunakan itu adalah di dalam bentuk kontrak RIBA.

(2) Di dalam kes ini, tidak terdapat sub-kontrak rasmi tetapi hanya surat award. Kontrak di dalam bentuk kontrak RIBA tidak digunakan dan perakuan tersebut tidak merupakan perakuan di bawah RIBA. Oleh kerana tuntutan defendan berkaitan dengan

kerja sub-kontrak itu secara langsung, ia boleh mempertikaikan jumlah di dalam perakuan itu dan menimbulkan pembelaan tolakan. Lagipun, tuntutan untuk kerja pembaikan itu adalah suatu isu yang perlu dibicarakan yang seharusnya dihujahkan pada suatu perbicaraan penuh.

(3) Bagaimanapun, mahkamah berasa teragak ragu tentang kebenaran tuntutan balas defendan berkenaan dengan kerja pembaikan itu kerana tuntutan itu hanya ditimbulkan selepas guaman ini difailkan dan selepas pihak ketiga telah memasuki tapak itu. Dengan demikian, defendan diberikan kebenaran membela atas syarat ia membayar jumlah RM465,034.12 (RM952,972.43 tolak RM487,938.31 (jumlah minimum yang defendan bersedia mempertikaikan)) ke dalam mahkamah dalam masa 14 hari, dan jika defendan ingkar berbuat demikian plaintif akan berhak mendapatkan penghakiman bagi jumlah tersebut.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No B–02–30–94.]

Notes

For cases on bulding contracts, see 3 *Mallal's Digest* (4th Ed) paras 938–941; [1991] Mallal's Digest 701–708; [1992] Mallal's Digest 547–555; [1993] Mallal's Digest 450–455.

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2246–2264, 2287–2296; [1989] Mallal's Digest 432–433, 525; [1990] Mallal's Digest 222, 405–407, 445–446; [1991] Mallal's Digest 470–475; [1992] Mallal's Digest 391–392; [1993] Mallal's Digest 303–305, 310.

Cases referred to

Bandar Raya Development Bhd v Woon Hoe Kan & Sons Sdn Bhd [1972] 1 MLJ 75 (distd)

British and Commonwealth Holdings plc v Quadrex Holdings Inc [1989] QB 842; [1989] 3 All ER 492; [1989] 3 WLR 723 (folld)

Dawnays Ltd v FG Minter and Trollope and Colls Ltd [1971] 2 All ER 1389; [1971] 1 WLR 1205 (not folld)

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689; [1973] 3 All ER 195; [1973] 3 WLR 421 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 27

WE Low (*Vincent Lim & Teoh*) for the plaintiff.
Kelvin Kong (*Heng & Mogan*) for the defendant.

Ranita Hussein JC: The plaintiff had undertaken nine packages of sub-contract works for a construction project of the defendant and claimed a sum of RM952,972.43 said to be the balance of the sum owing by the

defendant to the plaintiff for works done. He filed an application for judgment under O 14 and alternatively under O 27.

At the hearing, however, the plaintiff confined his application to O 14. He based his claim on various certificates of payment issued by the defendant but left unpaid. It was his contention that according to the agreement constituted by various letters of awards, the certificates of payment were to be honoured within 30 days of their issue by the defendant.

The defendant, while admitting that the sum of RM952,972.43 was the balance left unpaid under the certificates of payment, disputed its liability to pay. It was alleged that the certificates of payment were only interim certificates and payment was subject to final measurements and valuation. In its defence, the defendant claimed a set-off of RM4,158.89 being charges for plant and machinery hired by the plaintiff. The defendant also alleged that defective works of the plaintiff were discovered after the certificates of payment were issued and claimed an amount of RM615,000 being the estimated cost for rectifying the defects.

The plaintiff argued, first, that there could not be any set-off or cross-claim when an amount is due under an interim certificate of payment. He referred to *Bandar Raya Development Bhd v Woon Hoe Kan & Sons Sdn Bhd* [1972] 1 MLJ 75, where the court relied on the case of *Dawnays Ltd v FG Minter and Trollope and Colls Ltd* [1971] 2 All ER 1389; [1971] 1 WLR 1205 in holding that where a claim was based on an interim certificate of payment there was no right of set-off or counterclaim. *Dawnays'* case has, however, been overturned by *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; [1973] 3 All ER 195; [1973] 3 WLR 421 where Lord Reid stated as follows ([1974] AC 689 at pp 698–699; [1973] 3 All ER 195 at p 200; [1973] 3 WLR 421 at p 426):

> I doubt whether leave to appeal would have been given in this case were it not for the fact that in a series of cases beginning with *Dawnays'* case, the Court of Appeal have come near to laying down a general rule that not only in cases between employer and contractor, but also in cases between contractor and sub-contractor, sums due under an architect's certificate must be paid at once without waiting for the determination of claims for set-off based on breaches of warranty in respect of the work to which the certificate relates. That may be right under the RIBA form of contract in cases between employer and contractor ... But it is certainly not right in cases between contractor and sub-contractor. Then each case must depend on the terms of the sub-contract and there can be no presumption of any general rule there.

What stands out in *Gilbert Ash*'s case is that *Dawnays'* case dealt with the RIBA form of contract.

In the case of *Bandar Raya Development Bhd*, it is unclear whether the standard forms under RIBA were used. There were, however, written contracts with the possibility that the relevant contracts approached the RIBA form of sub-contract, at the very least.

In the circumstances, there is room to distinguish *Bandar Raya Development*'s case as follows:

A In the present case, no formal sub-contracts were submitted in evidence, only letters of award exhibited as OBT3– OBT11 in the plaintiff's affidavit of 10 March 1994. There is, thus, no evidence that any RIBA form of contract was used. In fact, counsel for the plaintiff himself submitted that the interim certificates in this case were not certificates under RIBA.

B Furthermore, the defendant's claims against the plaintiff are directly related to the sub-contract works. This was not the circumstances in the case of *Bandar Raya Development*. In that case, the court found that the appellant's cross-claim against the respondent was essentially a claim for reimbursement of payments due from the appellant for the cost of works done under a 1970 agreement with the Commissioner of the Federal C Capital. The court further found that the said 1970 agreement did not specify that the works were rendered necessary as a result of the negligence of the respondents in the execution of the contract works under their earlier agreements. This fact impelled the court to hold that the appellants could not claim entitlement to set off the relevant sum against the D respondent.

In the circumstances, I am of the view that the defendant is entitled to dispute the amount in the certificates of payment and put up a defence of set-off. It bears mention here that the submission by the plaintiff that any deductions should be stated in the certificates of payment is unsupported by anything in the affidavit evidence.

E The sum estimated for rectification works was questioned by the plaintiff as being excessive and without justification, and he disputed his liability in respect thereof. He further argued that the retention sums of 5% of the contract sum and 10% of the certified payments could be used by the defendant for the repairs. However, as pointed out by the defendant, F the defective works have been adequately listed in the statement of defence and graphically supported by the photographs exhibited as MBf2 in his affidavit-in-reply dated 22 April 1994. Counsel for the defendant further argued that the sum claimed was a conservative estimate and the actual cost would probably be higher in view of the rising cost in supplies and G works. As such, the retention sums would not be sufficient to meet the cost. The claim for rectification works is, to my mind, a triable issue which needs to be argued at a full trial.

The other sum claimed by the defendant and disputed by the plaintiff was the sum of RM4,158.89 purported to be the charges for plant and machinery hired out to the plaintiff. On the other hand, there was the H plaintiff's claim for RM30,175.83 as interest for the loss of the use of money due to him caused by the delay in payment, which matter was disputed by the defendant on the ground that there was no basis for it in the contract.

On the totality of the affidavit evidence and the arguments made I before me, I am convinced that this is not a case where I can give summary judgment.

I find that while there is still unresolved the question of whether payment by the defendant is subject to final measurements and valuation

in the event of dispute as submitted in the defendant's main argument, there cannot be a partial admission of the debt for which judgment can be given as the debt may not be due. I, nonetheless, harbour some reservations on the defence, particularly the veracity of the defendant's cross-claim pertaining to remedial works on the alleged defective works of the plaintiff in view of the fact that such claim was raised only after the suit was filed and after third parties have gone into the site.

Where the defence can be described as shadowy it has been the practice of courts to give conditional leave to defend (see *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842; [1989] 3 All ER 492; [1989] 3 WLR 723). Accordingly, the defendant is given leave to defend on condition that it paid the sum of RM465,034.12 into court within a period of 14 days of the order, in default of which payment the plaintiff was to be entitled to judgment for that sum. The deposit sum was arrived at by deducting RM487,938.31 (the minimum sum that the defendant was prepared to dispute as indicated in its alternative argument) from the sum of RM952,972.43 claimed by the plaintiff.

Application dismissed.

Reported by Anne Khoo